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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ELY DROMY et al., Plaintiffs, Cross-defendants and Appellants, v. ABRAHAM ASSIL, Defendant, Cross-complainant and Respondent.	B259489 (Los Angeles County Super. Ct. No. BC417850)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael P. Linfield, Judge. Affirmed with directions.

Horvitz & Levy, Jeremy B. Rosen, Scott P. Dixler; Fink & Steinberg, Thompson, Coe & O'Meara and S. Keven Steinberg for Plaintiffs, Cross-defendants and Appellants.

Law Office of Mitchel T. Stanton, Mitchel T. Stanton; Greines, Martin, Stein & Richland and Marc J. Poster for Defendant, Cross-complainant and Respondent.

Ely Dromy and the other appellants (Dromy) argue the trial court erred in awarding attorney fees to respondent Abraham Assil (Assil) following a jury and bench trial. Dromy claims the court instead should have declared him the prevailing party and awarded him fees. Dromy alternatively argues if the court did properly determine Assil was the prevailing party, it should have awarded less fees to Assil. We disagree and affirm.

BACKGROUND

Dromy and Assil were friendly associates until 2009. In April 2009, Assil asked Dromy for a $1.5 million loan for "personal" reasons. Dromy, a wealthy real estate magnate, agreed. In exchange, Assil signed a "straight note" to the Dromy Family Trust for $1.5 million. The note was collateralized by Assil's personal residence. The note bore a 20 percent interest rate and contained an attorney fees clause. Assil approached Dromy again just a few days later, asking for an additional $1.5 million. Assil admitted this time, however, he would not be using the funds for personal reasons. Instead, Assil said he planned to invest the funds in purchasing a group of underperforming loans from the Federal Deposit Insurance Corporation (FDIC), which, according to Dromy, Assil believed had the potential to be high performing. Assil said he only needed Dromy's money in the short term while he was waiting for a pending line of credit from his bank to come through. Dromy agreed to supply Assil with the additional $1.5 million and wired it to the FDIC on Assil's behalf. In exchange, Assil signed a second "straight note" for $1.5 million to Dromy International Investment Corporation. The note was collateralized by a commercial building. Like the first note, this note bore a 20 percent interest rate and contained an attorney fees clause.

Dromy testified he and Assil agreed he would be a partner in the FDIC loan pool purchase and the notes were only a preliminary security measure for his investment, with paperwork evidencing their investor agreement forthcoming. Assil, on the other hand, testified no such investor agreement ever existed. On June 26, 2009, Assil's bank extended him the line of credit he had been anticipating. Assil testified that only three

days later he "offered Dromy immediate payment on the notes and asked Dromy for the payoff amounts." Dromy did not provide Assil with payoff amounts at that time.

Dromy sued Assil on July 14, 2009, primarily claiming Assil had not only agreed to pay off the notes, but had also agreed Dromy would be an investor in the FDIC loan pool purchase and reneged on that promise. In August 2009, Dromy began nonjudicial foreclosure proceedings on the notes' securing real properties. Dromy then provided Assil with payoff amounts on the notes. The payoff amounts included principal, interest, legal fees, foreclosure fees and costs, and other charges. Assil paid the notes in full.

In October 2010, Dromy filed a second amended complaint (SAC).[1] Dromy pleaded breach of oral contract, breach of fiduciary duty, breach of the duty of good faith and fair dealing, fraud, accounting, constructive trust, conversion, and violation of Business and Professions Code section 17200. Assil filed a cross-complaint against Dromy for wrongful foreclosure, usury, breach of the notes, and money had and received.

Five years later, the case came to trial. The parties stipulated to have a jury trial for Dromy's complaint and a bench trial for Assil's cross-complaint. The jury trial on the complaint lasted four and a half days. The jury returned a decisive verdict against Dromy. He recovered nothing. In its specific verdicts, the jury found that Dromy and Assil had not entered into an agreement for Dromy to become an investor in the FDIC loan pool; Assil had no fiduciary duty to Dromy; and Assil had not made a false representation to Dromy.

Dissimilarly, Assil had mixed results on the cross-complaint. On the one hand, Assil lost his usury claim. The court ruled that as a real estate broker, Dromy was statutorily exempt from regular usury laws and was permitted to charge Assil a 20 percent interest rate on the notes. On the other hand, the court ruled Dromy had overcharged Assil in attorney fees and daily interest in paying off the notes. The court awarded Assil $86,890.64 in damages for these claims. The court then determined Assil was the prevailing party and awarded him $371,814 in attorney fees under the notes' fees

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[1] It is unclear whether a first amended complaint was filed.

clauses, but excluded fees for work done exclusively on the complaint before the cross-complaint was filed. The court determined Dromy owed Assil fees because Assil prevailed on his breach of contract claims which arose from the notes' terms. Dromy appealed.

DISCUSSION

On appeal, Dromy argues the court erred in (1) failing to declare Dromy the prevailing party, and (2) awarding Assil fees (a) for work which was not "fee-eligible" and (b) for work done in connection with his usury cause of action, which he lost. Dromy did not appeal the trial's courts damages award of $86,890.64.

We review an attorney fees award for an abuse of discretion. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095.) "'The experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.'" (*Ibid*., quoting *Serrano v. Priest* (1977) 20 Cal.3d 25, 49.) This is because "an experienced trial judge is in a much better position than an appellate court to assess the value of the legal services rendered in his or her court." (*Children's Hospital & Medical Center v. Bonta* (2002) 97 Cal.App.4th 740, 782.) It is Dromy's burden on appeal to establish the fee award was an abuse of discretion that "shocks the conscience or is not supported by the evidence" (*Jones v. Union Bank of California* (2005) 127 Cal.App.4th 542, 550) because the court did not act """"within the permissible *range* of options set by the legal criteria""" (*Robbins v. Alibrandi* (2005) 127 Cal.4th 438, 452 (*Robbins*), italics added).

When parties contract out of the normal American fee system, where each party bears its own costs, a "trial court exercises a particularly 'wide discretion' in determining who, if anyone, is the prevailing party for purposes of [Civil Code] section 1717[, subdivision] (a)." (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 894 (*Blickman Turkus*).) In fact, "[i]f neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract." (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103,

1109.) "'[N]o mechanical formula . . . dictate[s] how the [trial] court should evaluate'" the factors pertinent to determining which party is the prevailing party. (*Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 41 [discussing calculation of lodestar figures].)

A. The court did not abuse its discretion in determining Assil was the prevailing party.

The trial court is afforded "particularly 'wide discretion'" in determining which party is the prevailing party under Civil Code section 1717. (*Blickman Turkus, supra*, 162 Cal.App.4th at p. 894.) Here, even the simplest explanation of the case's outcome—that Assil recovered something while Dromy recovered nothing—supports the trial court's determination that Assil was the prevailing party. The court, however, offered a more nuanced analysis, albeit along these same simple lines.

As a preliminary matter, Dromy cannot argue he was the prevailing party on his complaint. He squarely lost when the jury returned a verdict against him, awarding him nothing. As to the cross-complaint, reasonable minds could disagree as to which party, if either, was the prevailing party. Dromy argues that the court could have determined he was the prevailing party. He says such a conclusion would have been warranted because he successfully defended himself against Assil's usury claim, thereby "obtain[ing] greater relief" because Assil recovered less than 10 percent of his requested relief. (See Civ. Code, § 1717, subd. (b)(1) ["the party prevailing on the contract shall be the party who recovered a greater relief in the action on the contract"].) Even accepting Dromy's calculation as correct, the trial court is not precluded from determining a party is the prevailing party merely because the party recovered only a percentage of its requested relief. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1251 (*Taylor*) ["'There is "no mathematical rule requiring proportionality between compensatory damages and attorney's fees awards"'"].)

The court, however, did not simply look at the comparative monetary recoveries in determining Assil was the prevailing party on his cross-complaint. Instead, it held that Assil was "the prevailing party on his breach of contract claims" and those claims

comprised the counter-complaint's causes of action; in other words, Assil was the prevailing party on the gravamen of his cross-complaint. At trial, Dromy contended that Assil's claims were not "on a contract" for Civil Code section 1717 purposes. The court reasoned that "[a]n action (or cause of action) is 'on a contract' for purposes of section 1717 if (1) the action (or cause of action) 'involves' an agreement, in the sense that the action (or cause of action) arises out of, is based upon, or relates to an agreement by seeking to define or interpret its terms or to determine or enforce a party's rights or duties under the agreement; and (2) the agreement contains an attorney fees clause. (*Douglas E. Barnhart, Inc. v. CMC Fabricators, Inc.* (2012) 211 Cal.App.4th 230, 242.)" The trial court concluded that Assil's cross-complaint causes of action were "on the contract" because they related to enforcing Assil's rights to limit the amount of interest and attorney fees owed to Dromy under the notes' terms. On the whole, the court found Assil had "recovered the greater relief on the contract," which encompassed all his counter-claim causes of action, because Dromy took "nothing" whereas Assil took more than $86,000, even though Assil had not won every cause of action.

The abuse of discretion standard as applied in this context is not whether we or Dromy think the trial court selected the correct prevailing party, it is whether the trial court was legally permitted to select the prevailing party it did. (*Robbins*, *supra*, 127 Cal.4th at p. 452.) We cannot say the trial court abused its discretion in selecting Assil as the prevailing party given the "particularly 'wide discretion'" the court has in selecting a prevailing party and the facts that (1) Dromy recovered zero dollars on his complaint whereas Assil recovered more than $86,000 on his cross-complaint; (2) Assil prevailed on the cross-complaint's central issue: whether the notes represented the extent of the agreement between the parties and Dromy was bound by their terms (regardless of the proportion of Assil's recovery to his requested relief); and (3) the court thoroughly explained how selecting Assil as the prevailing party was legally permissible. (*Blickman Turkus*, *supra*, 162 Cal.App.4th at p. 894.) Because Dromy is not the prevailing party, he is not entitled to fees. (Civ. Code, § 1717 [allowing for award of fees to the *prevailing* party].)

B. The court did not abuse its discretion in awarding fees in connection with all the cross-complaint's causes of action, including for work done on causes of action on which Assil did not prevail.

Dromy argues that even if the trial court was correct in determining Assil was the prevailing party, Assil's fee award should be lessened by the amount attributable to work done on causes of action which were not "fee-eligible" and those which Assil lost.

Dromy argues the causes of action can be distinguished by those that are "fee-eligible" and those that are not "fee-eligible." That is, Dromy says only some of the causes of action are covered by the attorney fees clauses in the notes. The causes of action, however, cannot be so neatly parceled here. The related causes of action *themselves* limited the scope of the litigation to one overarching issue: whether Dromy could recover against Assil as an excluded partner in the FDIC loan pool purchase or whether Dromy's recovery was limited by the terms of the notes. This overarching issue required the same "common core of facts" of evidence to be established—namely whether the notes were the only contract between Dromy and Assil and, if so, could and should be enforced. (*Taylor*, *supra*, 222 Cal.App.4th at p. 1251.) These facts were established during both the jury and the bench trials. "'"Attorneys fees need not be apportioned between distinct causes of action where plaintiff's various claims involve a common core of facts or are based on related legal theories." [Citation.]' [Citation.] Nor is '[a]pportionment . . . required when the issues in the fee and nonfee claims are so inextricably intertwined that it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units. [Citations.]'" (*Taylor*, *supra*, 222 Cal.App.4th at p. 1251, quoting *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 158–159 (*Graciano*).) The reliance of each cause of action on a "common core of facts" "inextricably intertwined" the causes of action such that it was not an abuse of discretion for the trial court to decline trying to untangle each cause of action from the others to apportion fees. (*Taylor*, at p. 1251.)

Dromy also contends Assil prevailed only on his claims that Dromy charged him excessive interest and attorney fees for the foreclosure sale and should be awarded fees in

connection with only that claim. In other words, Dromy says Assil should not be allowed to recover fees for litigating his usury claim, which he lost. Even in light of Assil's loss, "'"[w]here a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised." [Citation.]'" (*Taylor, supra*, 222 Cal.App.4th at p. 1251.) As discussed above, the court permissibly determined that the causes of action were based on a "common core of facts" and "inextricably intertwined" and Assil had won on the gravamen of his complaint. Accordingly, the court was permitted to award Assil fees even though he did not win on every cause of action.

In spite of the fact that "'[a]ttorney's fees need not be apportioned when incurred for representation on an issue common to both a cause of action in which fees are proper and one in which they are not allowed,'" Dromy insists the usury claim is entirely distinct from the contract-based claims as a statutory issue and Assil's fees award should be lessened by work done in connection with it. (*Graciano, supra*, 144 Cal.App.4th at pp. 158–159.) Knowing all the facts and the outcome of the case, we agree that in hindsight or on a theoretical level the usury issue could be parceled out from the contract claims. However, Assil litigated the 20 percent interest issue as being an illegal contract term under article XV, section 1 of the California Constitution, making it a contract issue *when it was being litigated by him at trial*. He did not argue it as a statutory issue, for example, by contending that Dromy was not a real estate broker as he claimed. Again, "[w]here fees are authorized for some causes of action in a complaint but not for others, allocation is a matter within the trial court's discretion." (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1604.) Here, where Assil litigated the claim as a contract issue based on the same facts as the other claims, the court did not abuse its discretion in finding that Assil was entitled to recover fees in connection with it, even though the issue was ultimately disposed of by statute.

Dromy also claims that any inability of the court to parcel out the usury claim fees due to Assil's counsels' vague time entries should be held against Assil, not Dromy. While we agree with that proposition as a general matter, "[a]pportionment is not

required when the issues in the fee and nonfee claims are so inextricably intertwined," as the trial court permissibly determined they were here, "that it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units." (*Graciano*, *supra*, 144 Cal.App.4th at p. 159.) We cannot say it was an abuse of discretion for the court to decline parceling out individual entries for the usury claim where the claims were "inextricably intertwined" because they were based on the same "common core of facts" as the other contract claims and litigated as contract claims.

Dromy cites a number of cases where fees were apportioned, arguing we should follow suit. These cases are distinguishable, however. In these cases, there were clearer avenues to apportion fees. For example, in *Shadoan v. World Savings & Loan Assn.*, plaintiffs were allowed to recover fees only for their individual causes of action that were on a contract, but not for representative causes of action brought under a statute which did not provide for fees. (*Shadoan v. World Savings & Loan Assn.* (1990) 219 Cal.App.3d 97.) In *El Escorial Owners' Assn. v. DLC Plastering, Inc.*, defendants were allowed to recover only on contract issues after tort and contract causes of action were tried together. (*El Escorial Owners' Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337.) In *Heppler v. J.M. Peters Co.*, after suing four subcontractors, plaintiff was allowed to recover against only the one subcontractor it won against, not the other three. (*Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265.) *Epstein v. Frank* and *Bell v. Vista Unified School Dist.* are not persuasive because they concern statutory-based fees, which are not at issue here. (*Epstein v. Frank* (1981) 125 Cal.App.3d 111; *Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672.) Even if we looked at *Epstein* and *Bell* for general principles about "fee-eligible" and not "fee-eligible" claims, the cases are unpersuasive because they are likewise distinguishable. In *Epstein*, of the 15 notes plaintiffs sued on, they could recover fees only for the 10 notes the court determined were payable. In *Bell*, plaintiff was allowed to recover fees only for the claims that were "substantively [begotten]" by a statute permitting fees, but not for other claims not arising under the fee-permitting statute. (*Bell*, at p. 688.)

In any event, it is irrelevant that there were other ways to determine the fee award. The question here under the abuse of discretion standard is whether the court's choice was """"within the permissible *range* of options set by the legal criteria,""""" not whether Dromy or this court thinks that choice was the best option. (*Robbins*, *supra*, 127 Cal.4th at p. 452, italics added.) Dromy's arguments about how much trial time or number of pages in briefs were spent on particular pleadings are therefore unavailing, as those comparisons represent only one way or one factor of how to determine fees.

In addition to properly determining the substantive issues on which to award fees, the court also had to reasonably calculate the dollar amount of the award. The court reasonably did so. It started, as is common, with the lodestar figure provided by Assil. (*Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 58; *EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 774.) It determined Assil's lodestar figure was within reason based on his counsels' hourly rates and the number of hours expended. Dromy can hardly complain Assil's lodestar figure is unreasonable when Dromy claimed he was entitled to fees that were within 3 percent of Assil's estimate and made no substantive argument as to why his litigation efforts deserved to be compensated more than Assil's.[2] (*Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 262 [upholding a fee award as reasonable, especially given losing party presented no evidence it was not].) As requested by Dromy, the court also reduced Assil's requested amount by the amount spent purely on the complaint, before the cross-complaint was filed and the issues became so intertwined they could not be separated. Given the court's reasoned calculations, we cannot say the court abused its discretion in determining the dollar-figure awarded to Assil.

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[2] Dromy requested $424,687 in attorney fees whereas Assil requested $434,304.

DISPOSITION

The judgement is affirmed. Assil is awarded his costs on appeal under California Rules of Court, rule 8.278. Remanded to determine attorney fees on appeal.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.